THE AMERICANS WITH DISABILITIES ACT OF 1990

The issue discussed is whether the Americans with Disabilities Act of 1990 (the "ADA") requires the imposition of smoking bans or severe restrictions on smoking in indoor workplaces or public places.

I. THE ADA RESPONSE

The ADA does not mandate or require smoking bans.

1. First, nothing in the express terms of the ADA mandates the imposition of any smoking policy of any kind by entities covered by the ADA.

2. Second, even if an individual could establish that he or she were "hypersensitive" to tobacco smoke and thus allegedly "disabled" under the ADA, an entity covered by the ADA would only be required to make a reasonable accommodation of the claimant's needs. Such reasonable accommodation does not require smoking bans.

3. Third, according to an EEOC official, "The ADA does not require employers to have a smoke-free environment or prevent it. It does not interfere one way or the other." See Andrew Blum, "Secondhand Smoke Suits May Catch Fire,"

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The National Law Journal, March 1, 1993 at 1, 12. This official also observed that requiring an employer to accommodate a person who claims to be disabled by ETS exposure with a smoke-free environment "could also be an undue hardship on the company and other employees." Id.

II. OVERVIEW SUMMARY

Some courts have concluded that ETS hypersensitivity is a handicap under the Rehabilitation Act, which defines "handicap" in the same way that "disability" is defined under the ADA.[1] The degree of an individual's sensitivity, however, determines the outcome in such handicap discrimination cases and may be difficult to prove in light of scientific evidence failing to link perceived ETS intolerance with actual decrease in pulmonary function. Mere irritation in the presence of ETS has not been enough to trigger a finding of disability.

Moreover, if an employee who claims discrimination on the basis of disability has other employment opportunities readily available within the geographic area and is only disabled with respect to a particular job, the courts have held, and the EEOC rules which implement the ADA provide, that this individual is not

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1. As these terms are intended by Congress to be synonymous, they will be used interchangeably herein.

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disabled. Thus, a showing that there are comparable smoke-free employment opportunities for the alleged ETS-sensitive employee elsewhere will preclude a court from requiring an employer to impose a workplace smoking ban to remedy a claim of discrimination.

Once a court determines that an individual is disabled under the ADA, it must then determine whether the employer has reasonably accommodated the disability before a finding of discrimination can be made. The requirement of reasonable accommodation can be overcome by a showing of undue hardship. The ADA defines undue hardship, in the main, in terms of cost considerations.

A collective bargaining agreement can stand in the way of a smoking ban, as its terms may be relevant to an employer defense of undue hardship. Disruption to other employees, patrons and customers is also a factor which the courts are required to consider under the EEOC rules, thus the rights of smoking employees must be balanced with the right of an alleged ETS-sensitive employee to work in a smoke-free environment. Although nothing in the ADA "shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment," an EEOC official has stated publicly that workplace smoking bans are not required under the ADA.

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III. DISCUSSION

A. LEGISLATIVE OVERVIEW

The ADA was enacted by Congress in 1990, and signed into law by President Bush on July 26 of that year. 42 U.S.C.A. §§ 12101 - 12213. Title I of the ADA expands the employment protections afforded to the disabled under the Rehabilitation Act of 1973, 29 U.S.C.A. § 701 et seq., by prohibiting private sector employers with a specified number of employees from discriminating against the disabled in accordance with its provisions.[2] Congress is also subject to the ADA's provisions. 42 U.S.C.A. § 12209.

The agency given enforcement authority under the ADA is the Equal Employment Opportunity Commission (EEOC), 42 U.S.C.A.

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2. The Rehabilitation Act applies only to government employers and those employers who contract with the federal government or whose programs and activities receive federal assistance. In contrast, under the ADA, any employer "engaged in an industry affecting commerce" with 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year were required to comply with the ADA two years after the date of enactment, or July 26, 1992. Employers with 15 or more employees for each of 20 or more calendar weeks in the current or preceding year will be required to comply with the ADA on July 26, 1994. 42 U.S.C.A. § 12111(5)(A).

Title III of the ADA prohibits discrimination against the disabled in places of public accommodation such as hotels, restaurants, theaters, retail establishments, museums, schools, and day care centers. See 42 U.S.C.A. § 12181(7). This memorandum only addresses the issue of discrimination in places of public accommodation to the extent that this issue has been raised in litigation currently pending in federal court in Connecticut.

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§ 12117(a), which was charged with issuing regulations implementing Title I of the ADA within one year of its enactment. Id. § 12116. The rules, regulations and interpretive guidance relating to Title I are codified at Equal Employment Opportunity for Individuals With Disabilities, 29 C.F.R. § 1630 (1992). These implementing and interpretive provisions will be given particular weight by the courts in construing the language of the ADA. In this regard, see School Board of Nassau County v. Arline, 480 U.S. 273 (1987), where the U.S. Supreme Court stated that, in construing the Rehabilitation Act, the federal courts rely heavily upon its implementing regulations in that they were drafted with the oversight and approval of Congress.

The ADA incorporated the Rehabilitation Act regulations into its definitions, and is intended to be interpreted in light of the cases decided under the Rehabilitation Act. The legislative history and EEOC rules and regulations so state. House Reports No. 101-485(I) & (III), 1990 U.S.C.C.A.N. 332, 449; 29 C.F.R. § 1630.1(c)(1) (1992). Although neither Act lists specific mental or physical conditions that would qualify as disabilities -- and thus ETS sensitivity is not expressly identified as a disability under the ADA -- the statutory language of the ADA, the EEOC rules and regulations, and a significant body of case law interpreting the

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Rehabilitation Act provide some guidance as to what will qualify as a disabling condition.[3]

The ADA incorporates the powers, remedies and procedures of Title VII of the Civil Rights Act of 1964 for its enforcement scheme. 42 U.S.C.A. § 12117(a). The ADA may be enforced by the EEOC, the Attorney General or any individual who claims to be discriminated against on the basis of disability. Id. An individual who believes he or she has been discriminated against in employment on the basis of disability may file a complaint with the EEOC and may institute a private action in federal or state court after receiving a right to sue letter from the EEOC. Available remedies include equitable and injunctive relief, hiring or reinstatement, back pay, restoration of benefits and attorneys' fees for the prevailing party. See Evan J. Kemp, Jr. and Christopher G. Bell, A Labor Lawyer's Guide to the Americans with Disabilities Act of 1990, 15 Nova L.R. 31 (1991) (hereinafter Kemp & Bell).

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3. The National Council on Disability is an independent federal agency which developed the ADA and advises policy makers regarding the ADA's effectiveness. According to the Council, individuals currently not covered by the ADA include those with what the Council termed "emerging disabilities." These are persons "with environmental illnesses who are severely adversely affected by secondary smoke or other pollutants in public places." National Council on Disability, ADA Watch -- Year One: A Report to the President and the Congress on Progress in Implementing the Americans with Disabilities Act, Recommendation 13 at 61 (April 5, 1993).

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B. "DISABILITY"

Title I of the ADA defines a "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. ...

42 U.S.C.A. § 12111(8).

The ADA defines "disability" as follows:

> The term "disability" means, with respect to an individual--
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C.A. § 12102(2). "Physical or mental impairment" is further defined in the EEOC rules and regulations to include physiological disorders or conditions affecting the respiratory system. 29 C.F.R. § 1630.2(h) (1992). The phrase "major life activities" is defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Id. § 1630.2(i). "Substantially limits" is further defined as well and refers to the inability to perform a major life activity that the average person in the general population can perform. Id. § 1630.2(j).

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The factors to be considered in determining whether an individual is substantially limited in a major life activity include:

> (i) The nature and severity of the impairment;
> (ii) The duration or expected duration of the impairment; and
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

Id. § 1630.2(j)(2).

An otherwise qualified individual who can establish that an exposure in the workplace causes or aggravates a respiratory condition that substantially limits his or her ability to breathe or work could conceivably be classified as disabled under the ADA.[4]

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4. A "qualified individual with a disability" is defined in the EEOC rules as "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m).

A case considering this aspect of the Rehabilitation Act is an unpublished opinion, Pletten v. Merit Systems Protection Board, 908 F.2d 973 (6th Cir. 1990) (text in Westlaw), involving an alleged asthmatic who claimed he was handicapped by workplace exposure to ETS. The court stated that the "otherwise qualified" inquiry included consideration of the handicapped person's ability to perform the job's essential functions and whether reasonable accommodation would enable the handicapped person to perform those functions. Because it would have been impossible to impose a smoking ban throughout the military facility that employed the plaintiff and because the plaintiff required a work environment that was totally smoke free, the court found that the employee was

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The court in Probasco v. Iowa Civil Rights Comm'n, 420 N.W.2d 432 (1988), relying upon federal law on handicap discrimination, determined that hypersensitivity to environmental conditions in the workplace did not qualify as a disability under a state statute. But see Vickers v. Veterans Administration, 549 F. Supp. 85 (W.D. Wash. 1982) (meaning of the term "handicapped person" under the Rehabilitation Act); County of Fresno v. Fair Employment and Housing Comm'n, 277 Cal. Rptr. 557 (1991) ("handicap" within meaning of state statute).

In those cases where ETS exposure is merely annoying or bothersome, the courts refuse to make a finding of disability. See Osekre v. Yeutter, 54 FEP Cases 1341 (D. D.C. 1991) (aversion to tobacco smoke did not rise to level of physical handicap as employee was able to continue working at her place of employment in spite of "alleged allergy"); Gupton v. Commonwealth (U.S. Dist. Ct., E.D. Va., No. 3:91CV00358) (decided March 6, 1991), appeal filed (aversion to tobacco smoke, described as "a sporadic and occasionally disabling medical condition," fails to rise to level of "handicap"); Ryan v. Springfield Housing Auth., (Massachusetts Commission Against Discrimination, No. 89-SEM-0065) (decided Feb. 14, 1992) (where only evidence is that ETS "bothered" employee, insufficient evidence of handicap under state law). See also 93

4.(...continued)
not "qualified" under the Rehabilitation Act. (A discussion of "reasonable accommodation" appears infra.)

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Op. Att'y General 40 (Tenn. April 28, 1993) (ADA requires case-by-case evaluation of state employees and policies; therefore, there is no requirement of broad-based nonsmoking policies regarding employment).

If the issue is contested, an individual claiming to be hypersensitive to ETS may have difficulty meeting this standard purely as a scientific matter. Clinical investigations of individuals claiming hypersensitivity to ETS have been conducted, generally with negative or inconclusive results. See P. Witorsch, Effects of ETS Exposure on Pulmonary Function and Respiratory Health in Adults, in Environmental Tobacco Smoke: Proceedings of the International Symposium at McGill, 169, 178 (1990). Other investigators have failed to find any relationship between the perceived intolerance of asthmatic subjects, as determined by pulmonary function testing or the subject's own statements, and sensitivity or reaction to tobacco leaf extract. See R. Stankus, et al., Cigarette smoke-sensitive asthma: Challenge studies, 82 J. Allergy Clin. Immun. 331 (1988).

In addition, as is relevant to the workplace, asthmatic episodes can be triggered by stress. Identifying the actual cause of an asthmatic episode from a long list of candidate substances is quite difficult, particularly given the myriad substances to which individuals are exposed in modern enclosed office buildings

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and other facilities. Individuals suffering from building-related illnesses may believe that their problems are attributable to ETS because it is the most visible component of indoor air. In fact, studies by both government and private investigators indicate that ETS may be a factor in only two to four percent of indoor air quality complaints.

The EEOC rules and regulations further describe what is meant by a substantial limitation with respect to the major life activity of "working":

> (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
>
> (ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":
>
> (A) The geographical area to which the individual has reasonable access;...

29 C.F.R. § 1630.2(j)(3) (1992). According to commentators on the ADA, "The weight of judicial authority under the Rehabilitation Act indicates that denial of one job for one particular employer does not establish that a person is substantially limited in working." Kemp & Bell, supra, at 41. An exhaustive analysis of the "substantially limited" language of the Rehabilitation Act was

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undertaken by the court in E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980), which concluded that although Congress intended broad coverage of the Act, it is important to consider the number and types of jobs from which the impaired individual would be disqualified in making a determination of handicap under the Act. See also Maulding v. Sullivan, 1991 U.S. App. LEXIS 6254 (8th Cir. 1991), rehearing denied, 1992 U.S. App. LEXIS 9579 (1992) (court notes that even if plaintiff were handicapped due to chemical sensitivities, she could not show substantial limitation on major life activities as she could work in places other than a laboratory); Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984) (failure to qualify for a single job because of some impairment does not constitute being limited in a major life activity); Gomez v. Aldridge, Secretary of the Air Force, Pet. No. 0389007 (Jan. 17, 1989) (hypersensitivity to paint fumes and other toxic chemicals does not constitute handicap under Rehabilitation Act; EEOC says individual was able to work in other positions and thus was not impaired in major life activity of working).

C. "REASONABLE ACCOMMODATION" -- "UNDUE HARDSHIP"

The ADA provides that discrimination can include:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that accommodation

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would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C.A. § 12112(b)(5)(A).

Reasonable accommodation is defined in relevant part as "making existing facilities used by employees readily accessible to and usable by individuals with disabilities." Id. § 12111(9). "Undue hardship" under the ADA is "an action requiring significant difficulty or expense..." Id. § 12111(10)(A). Among the factors to be considered in determining undue hardship are the "nature and cost of the accommodation" and "the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity..." Id. § 12111(10)(B)(i) & (iv).

The cases involving employees claiming ETS-sensitivity indicate that measures significantly short of a smoking ban will be considered sufficient to prove reasonable accommodation. In Vickers, supra, the court outlined the extensive steps that had been taken by the employer to reduce the level of cigarette smoke in the handicapped individual's environment. These steps included separating smokers from nonsmokers by rearranging desks, securing voluntary agreements from smokers that they would not smoke in the presence of the plaintiff, filing a requisition for a special exhaust system, installing vents in the ceiling, purchasing an air

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purifier, and offering alternative employment to the plaintiff. 549 F. Supp. at 88. The court found that the employer did make a reasonable effort to accommodate the plaintiff's handicap while also trying to accommodate co-workers who smoked.[5]

In Gupton v. Commonwealth, supra, the court concluded that assigning the plaintiff to a no-smoking area was a reasonable accommodation of her aversion to tobacco smoke, assuming for the sake of argument that her aversion did amount to a handicap under the Rehabilitation Act. The court noted that the statute did not require the "drastic policy change" of a complete smoking ban to accommodate one individual, and observed that the employer could not enforce such a ban as there were other tenants in the building not under its control. See also Rosiak v. U.S. Dept. of the Army, 679 F. Supp. 444 (M.D. Pa. 1987) (employer made sufficient efforts to accommodate employee's allergy to dust and hydrocarbon fumes by making five job transfers and offering a respirator which the employee refused to wear).

The EEOC rules and regulations emphasize that financial considerations are important in making a determination of

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5. Because there was no requirement that the Veterans Administration forbid smoking in the workplace, the court determined that smoking employees also had rights which had to be balanced against the desire of the plaintiff that his working environment be smoke free. 549 F. Supp. at 89.

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reasonable accommodation and undue hardship, but an additional factor involves the impact of the accommodation upon "the ability of other employees to perform their duties and the impact on the facility's ability to conduct business." Id. § 1630.2(p)(2)(v).[6] If a significant number of employees are smokers, an employer can readily show that a smoking ban or restrictions would impair the ability of these employees to do their job. Similarly, if a number of customers or visitors to the employer's facility were smokers, the employer could demonstrate that a smoking ban would disrupt the conduct of its business.

The terms of a collective bargaining agreement also may be used by an employer under the ADA as evidence of undue hardship.

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6. To illustrate this factor, the interpretive guidance uses the following hypothetical:

> suppose an individual with a disabling visual impairment that makes it extremely difficult to see in dim lighting applies for a position as a waiter in a nightclub and requests that the club be brightly lit as a reasonable accommodation. Although the individual may be able to perform the job in bright lighting, the nightclub will probably be able to demonstrate that that particular accommodation, though inexpensive, would impose an undue hardship if the bright lighting would destroy the ambience of the nightclub and/or make it difficult for the customers to see the stage show.

Id. Appendix § 1630.2(p).

An employer can readily demonstrate that, at least in certain employment settings such as pool halls, lounges, casinos and bars, a smoke-free environment would destroy the ambience that customers have come to expect.

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29 C.F.R. Appendix § 1630.15(d) (1992). In Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987), the court stated that while a collective bargaining agreement cannot override federal law regarding employment of the handicapped, its provisions are factors to consider in determining whether a proposed accommodation is reasonable. See also Hall v. Turnage, 946 F.2d 895 (6th Cir. 1991) (text in Westlaw) (to accommodate an ETS-sensitive individual by means of a smoking ban would have required the union's consent because it would represent a change in working conditions); Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987) (employer could not reasonably accommodate employee with asthma by making a permanent light duty assignment in that collective bargaining agreement precluded such assignments for employees with less than five years' tenure).

The interplay of collective bargaining agreements and the ADA is currently an important issue.[7] A number of cases in recent years regarding employers' unilateral imposition of workplace smoking bans or restrictions have resulted in rulings of unfair labor practices. The courts consistently hold that smoking policies are a matter for collective bargaining. See, e.g., United

7. Lynn Rhinehart, representing the AFL-CIO during the an indoor air quality conference conducted in Baltimore, Maryland in April 1993, rejected the idea that the Occupational Safety and Health Administration should regulate smoking in the workplace given the shortage of inspectors available to monitor the nation's workplaces. She also observed that smoking is a matter of collective bargaining.

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Paperworkers International Union, Local 1279 v. Wisconsin Tissue Mills, Inc., 1993 U.S. Dist. LEXIS 3348 (D. E.D. Wisc. 1993); U.S. Department of Health and Human Services Region V v. National Treasury Employees Union Chapter 230, 1992 WL 183663 (F.L.R.A. 1992); Newark Valley Central School District v. Public Employment Relations Board, 1993 N.Y. App. Div. LEXIS 3729 (N.Y. App. Div. 1993).

The ADA prohibits collective bargaining agreements which directly discriminate against a person with a disability, 42 U.S.C.A. § 12112(b)(2), but is it not clear under the ADA whether an employer must incur the expense involved in violating the terms of a collective bargaining agreement which is not otherwise discriminatory in making a reasonable accommodation for a disabled employee. In a related development, the General Counsel of the National Labor Relations Board issued an opinion on August 7, 1992, stating that an employer must consult the union which represents an employee with a disability if an accommodation to such employee violates the collective bargaining agreement. See Americans With Disabilities: Practice and Compliance Manual, at 7 (July 1993).

IV. RECENT DEVELOPMENTS

At least one lawsuit has been filed under Title I of the ADA. Harmer v. Virginia Electric and Power Co., No. 3: 93CV168 (D.

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E.D. Va.) (filed March 10, 1993).[8] In addition, several lawsuits have been filed under Title III of the ADA to force places of public accommodation to ban smoking.

A. WORKPLACE DISCRIMINATION

The Harmer complaint closely tracks the language of the ADA and sets forth the elements which are needed to prove a disability discrimination claim.[9] Harmer, a Virginia Power employee since 1981, claims that he suffers from severe bronchial asthma

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8. Because the media have reported that some individuals are threatening to bring suit under the ADA, the ADA has had public visibility. See, e.g., "Lobbyist Threatens Federal Lawsuit Over Smoking at Capitol," Hartford Courant, February 5, 1993, at D9 (Fund for Animals lobbyist, Julie Lewin, claims she suffers from asthma and is barred from access to smoke-filled corridors of the legislative complex in violation of the ADA); "Legislator Loses Smoking Suit," Des Moines Register, April 4, 1993 at 5 (Representative Phil Brammer, a former smoker, lost his bid to obtain a court order banning smoking in the Iowa Statehouse; claiming he suffers chronic lung disease, Brammer vowed to bring an administrative action under the ADA). It is not clear whether these individuals would rely upon Title I of the Act to force the adoption of smoking bans, but the message that the Act may be available for this purpose has clearly reached the public.

9. It should be noted that Harmer has not alleged that his "disability" precludes his employment by some other employer within the geographic area to which he has reasonable access. This is considered by the EEOC to be a factor in determining whether an individual is substantially limited in the major life activity of "working." 29 C.F.R. § 1630.2(j)(3) (1992). Harmer has not alleged that he is disabled due to substantial limitations on his ability to work, but some courts have determined that it is important to consider the number and types of jobs from which the impaired individual would be disqualified in making a determination of substantial limitation in any major life activity under applicable federal law. See, e.g., E.E. Black, Ltd. v. Marshall, supra.

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which "substantially limits his ability to care for himself, his ability to breathe, his ability to walk and his life expectancy." He alleges that ETS significantly aggravates his "disability," Harmer further claims that Virginia Power refused his request to accommodate his "disability" by declaring a smoke-free workplace and subsequently reduced his purchasing authority as a buyer and passed over him in making a promotion.

Harmer claims Virginia Power has discriminated against him on the basis of his disability in violation of the ADA. He seeks a declaration of disability discrimination, an injunction against any further such conduct, an award of wages and benefits, costs, and compensatory and punitive damages in the amount of $300,000. He has purportedly fulfilled the administrative prerequisites to filing such an action, claiming that the EEOC issued him a right-to-sue letter on February 22, 1993.

In its response, Virginia Power asserts several defenses including claims that it has provided reasonable accommodation to Harmer, that the accommodation measures requested by Harmer would impose undue hardship, and that a complete smoking ban is unnecessary to allow Harmer to perform the essential functions of his position. Virginia Power also asserts that the Virginia Workers' Compensation Act bars some or all of Harmer's claims. A trial date of September 28, 1993, has been set in the case,

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although the court will have to first dispose of the motion for summary judgment filed by Virginia Power on July 27, 1993.

B. PLACES OF PUBLIC ACCOMMODATION

On March 30, 1993, plaintiffs filed three cases in U.S. District Court, Connecticut, against fast-food restaurants, seeking to enjoin them under Title III of the ADA from permitting smoking anywhere in their facilities. The plaintiffs are three children who allegedly suffer from asthma, and a woman who claims to be stricken with lupus. Staron v. McDonald's Corp.; Staron v. Burger King Corp.; Staron v. Wendy's Old Fashioned Hamburgers of New York, Inc., Nos. 93-CV-665 -666 -667 (D. Ct.) (filed March 30, 1993).

The plaintiffs claim that they have been unable to enter the defendants' restaurants without affecting their ability to breathe and that full access is "readily achievable" by the implementation of a smoking prohibition. They seek a declaratory judgment of discrimination on the basis of disability, an injunction prohibiting the defendants from continuing any policy which interferes with the plaintiffs' use of their facilities, costs and attorneys' fees.[10] McDonald's and Burger King have filed

10. In Texas, a woman who claims that she is disabled with cystic fibrosis has filed a pro se claim under the ADA, claiming that a Forth Worth jazz club is discriminating against her by permitting smoking. In re: Emery and Caravan of Dreams; see "CF Sufferer fights to make nightclub smoke-free," UPI, May 1, 1993.

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motions to dismiss which have not yet been decided by the court. Wendy's filed an answer to the complaint denying that it owns or operates any Wendy's restaurant in Hartford County, Connecticut, as alleged by the plaintiffs, and a status conference was held on May 28, 1993. Since that time, the plaintiffs have filed a motion to add an additional party defendant and to amend their complaint.

C. EEOC RESPONDS TO CLAIMS

Anti-smoking groups, such as Action on Smoking and Health (ASH) and the Tobacco Products Liability Project, have been actively publicizing the possibility of using the ADA to force employers and places of public accommodation to ban smoking.

At a conference on indoor air quality issues held in April 1993 in Baltimore, Maryland, representatives of ASH, including executive director John Banzhaf, asserted repeatedly that the ADA would be the vehicle for nonsmokers to succeed at banning smoking in indoor spaces across the country. He and other anti-smoking activists are convinced that, armed with the EPA Risk Assessment on ETS and the ADA, the "millions" of Americans disabled by ETS exposure will be able to convince the courts that their disabilities can only be reasonably accommodated by total smoking bans.

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As noted above, the EEOC response was that "[t]he ADA does not require employers to have a smoke-free environment or prevent it. It does not interfere one way or the other." See Andrew Blum, "Secondhand Smoke Suits May Catch Fire," The National Law Journal, March 1, 1993 at 1, 12. This official also observed that requiring an employer to accommodate a person who claims to be disabled by ETS exposure with a smoke-free environment "could also be an undue hardship on the company and other employees." Id.

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